On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF RESPONDENT INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, AND ITS LOCAL 209 IN OPPOSITION

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SUBJECT INDEX

	Page
Opinions below	1
Questions presented	2
Statement of the case	3
The facts	3
The suit to enjoin arbitration	5
The opinion of the court below on arbitrabilty	5
The arbitrator's opinion and award	8
The setting aside of the award by the district court	9
The decision below by the court of appeals	9
Reasons for denying the writ	10
1. This case does not afford an opportunity to this Court to resolve the appropriate standard of review of arbitration awards	10
2. The decision below presents no conflict with any decision of this Court or with any of the courts of appeals	12
3. The arbitrator's award was so clearly correct that its enforcement presents no issue deserving review	12
4. The decision below awarding limited attorney's fees is correct and presents no issue requiring review by this Court	14
Conclusion	16
Appendix	1a

CITATIONS

CASES:

Cedar Rapids Engineering Co., 58 LA 374 (Albert Epstein, 1972)	13
Chromalloy American Corp. & I.U.E., 54 LA 965 (Edwin A. Elliot, 1970)	13

Page

Fleischman Distilling Corp. v. *Maier Brewing Co.*, 386 U.S. 714 (1967) 15
Fred Rueping Leather Co., 57 LA 58 (Gerald G. Somers, 1971) 13
Fruehauf Corp., 54 LA 1093 (Alpheus R. Marshall, 1970) 13
Gartland-Haswell Foundry Co., 60 LA 1061 (David L. Kabaker, 1973) 13
Gibson Refrigerator, 50 LA 1052 (M. David Keefe, 1968) 13
Gould, Inc. (Engine Parts Division), 56 LA 712 (Marvin L. Schurke, 1971) 13
Hall v. *Cole*, 93 S.Ct. 1943 (May 21, 1973) 14, 15
Hawaiian Telephone Co. and I.B.E.W., 59 LA 366 (Joel Seidman, 1972) 13
Int'l Union District 50 v. *Bowman Transportation Inc.*, 421 F.2d 934 (5th Cir. 1970) 16
Local No. 149, I.U.A. v. *American Brake Shoe Co.*, 298 F.2d 212 (4th Cir. 1962) 16
Magnavox Co. of Tenn. v. *International U. of E., R. & M.W.*, 410 F.2d 388 (6th Cir. 1969) 9
Mills v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970) .. 15
Peerless Pressed Metal Corp. v. *I.U.E.*, 451 F.2d 19 (1st Cir. 1971) 1, 3, 5, 6, 7, 9, 11, 1a
Rodman Industries, Inc., 59 LA 101 (George R. Fleischil, 1972) 13
Safeway Stores v. *Bakery Workers Local 111*, 390 F.2d 79 (5th Cir. 1968) 10
Sprague v. *Ticonic National Bank*, 307 U.S. 161 (1939) 14, 15
Steelworkers v. *American Mfg. Co.*, 363 U.S. 564 (1960) 9, 10, 14
Steelworkers v. *Butler Mfg. Co.*, 439 F.2d 1110 (8th Cir. 1971) 16
Steelworkers v. *Enterprise Corp.*, 363 U.S. 593 (1960) 9, 10, 13, 14
Steelworkers v. *Warrior & Gulf Navigation Co.*, 363 U.S. 593 (1960) 9, 10, 14
Torrington Co. v. *Metal Products Workers Union Local 1645*, 362 F.2d 677 (2d Cir. 1966) 9

Page

STATUTE:

Labor Management Relations Act, Section 301, 29 U.S.C. 185 ..... 2, 9, 15

MISCELLANEOUS:

Dunau, Bernard, *Scope of Judicial Review of Labor Arbitration Awards,* N.Y.U. Conf. Lab., 24:175 (1971) 14

Harris, Philip, *Arbitrators and the Seniority Rights of Foremen,* Management of Personnel Quarterly, Fall 1966, p. 36 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-72

PEERLESS PRESSED METAL CORPORATION,
Petitioner,

v.

INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS, AFL-CIO, IN BEHALF OF ITSELF AND ITS LOCAL 209,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF OF RESPONDENT INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, AND ITS LOCAL 209 IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals holding that the district court properly ordered arbitration of the grievance is reported in 451 F.2d 19, and is reproduced as an appendix hereto, pp. 1a to 5a, *infra.*

The opinion of the court below enforcing the arbitration award is not officially reported, but is unofficially reported in 82 LRRM 8089 and reproduced as Appendix A to the petition for a writ of certiorari (pp. A-1 to A-2).[1] Two separate denials by Mr. Justice Brennan of the application for stay of the order of the court below enforcing the arbitration award were not accompanied by any opinion. (Application No. A-1077, filed April 25, 1973, denied April 26, 1973, and reapplication No. A-1077, filed on July 6, 1973, denied July 10, 1973).

The opinion of the district court setting aside the arbitration award is not reported but is reproduced as Appendix B to the petition (pp. A-3 to A-8). The opinion (pp. A-12 to A-29), award (pp. A-10 to A-11) and clarification of award (pp. A-30 to A-32) of the arbitrator are reproduced as Appendix C to the petition.

QUESTIONS PRESENTED

1. Whether a decision by the court of appeals, in proceedings to enjoin arbitration, that the collective bargaining agreement was susceptible of the interpretation urged by the grievant, precludes the district court, in proceedings to enforce the ensuing arbitrator's award, from setting aside the award on the ground that the collective bargaining agreement was not susceptible of such interpretation.

2. Whether the court of appeals had the power to assess the employer with attorneys fees incurred by the union in the district court in a suit brought by the union under Section 301 of the Labor Management Relations Act, 29 USC 185, where the court of appeals found

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[1] References to the appendices to the petition for a writ of certiorari are designated as pp. A—.

that the suit was necessitated by the intransigence of the employer in resisting enforcement of the arbitration award, after the court of appeals had ruled in the suit to enjoin arbitration that the collective bargaining agreement was susceptible of the interpretation adopted by the arbitrator.

STATEMENT OF THE CASE

The facts

The Peerless Pressed Metal Corporation, hereinafter called the Company, and the International Union of Electrical, Radio and Machine Workers, AFL-CIO, hereinafter called the Union, at all times here material have been parties to a collective bargaining agreement which by its express terms "applies only to all production and maintenance employees of the Company * * * excluding * * * supervisors" (pp. A-15 to A-16).

William J. Burke was hired by the Company on August 18, 1952 as a production employee and continued for the next 13 years to work as a production employee in the bargaining unit covered by the successive collective bargaining agreements between the Company and the Union (pp. A-3, A-12). On or about October 30, 1965, Burke was promoted to a supervisory position (p. A-12).

Burke continued to be employed by the Company in a supervisory position until September 11, 1970 when he was laid off (p. A-12). Burke immediately invoked his 13 years of seniority in the bargaining unit and on the basis thereof, claimed a right to reinstatement into the bargaining unit (p. A-18). The Company refused his request (p. A-13). Burke then requested the Union to grieve the Company's refusal to reinstate him (p.

A-13). The Union accordingly wrote the Company stating that the Union wanted Burke returned to the bargaining unit and accused the Company of violating the provisions of the collective bargaining agreement governing seniority rights by failing to reinstate Burke (p. A-13). The Company refused the Union's request and the Union invoked arbitration (p. 14).[2]

In accordance with the provisions of the collective bargaining agreement that arbitration shall be under the rules of the American Arbitration Association (pp. A-17 to A-18), the Union initiated correspondence with the American Arbitration Association to secure the appointment of an arbitrator (p. A-14). The Company wrote the American Arbitration Association stating that the Company did not consider the grievance arbitrable and opposing the appointment of an arbitrator (p. A-14). The American Arbitration Association advised the Company that issues of arbitrability would not be decided by the Association and that the Association would name an arbitrator (p. A-14). Although the Company instituted a suit to enjoin arbitration, the American Arbitration Association proceeded, without

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[2] Burke did not himself file a grievance. The collective bargaining agreement authorized the Union itself, as distinguished from an employee, to obtain resolution through the grievance procedure of "any controversy between the Parties * * * as to any matter" involving the interpretation or application of any of the provisions of this Agreement" (p. A-16). Arbitration is available to "either party" with respect to "any question involving the interpretation or application of the provisions of this Agreement" (p. A-17). The court of appeals in affirming the order directing arbitration quoted this language (451 F.2d at p. 20, p. 2a, *infra*) and the arbitrator found it unnecessary to determine whether Burke could grieve for the arbitration had been invoked on the Union's grievance (pp. A-24 to A-25).

awaiting final resolution of the injunction suit, to appoint James V. Altieri as arbitrator (pp. A-14, A-29).

The suit to enjoin arbitration

The Company filed an action for declaratory judgment in the United States District Court for the District of Massachusetts seeking to enjoin the arbitration (p. 1a, *infra*).[3] The district court denied the injunction and entered an order directing arbitration (pp. 1a-2a, 5a, *infra*).

The opinion of the court below on arbitrability

The order of the district court directing arbitration was appealed by the Company to the Court of Appeals for the First Circuit which affirmed the judgment of the district court. *Peerless Pressed Metal Corp.* v. *I.U.E.*, 451 F.2d 19 (1st Cir., 1971) (pp. 1a-5a, *infra*). The court of appeals, for the purpose of determining arbitrability, considered both the issue of whether the collective bargaining agreement was susceptible of the interpretation that the Union could grieve the Company's failure to accord Burke the seniority he accrued during his 13 years in the bargaining unit, and if so, of whether there could be an interpretation of the agreement providing for the reinstatement of Burke. The court held that it was possible for the arbitrator to rule in favor of the Union on both points. With respect to the right of reinstatement, the Court of Appeals carefully analyzed the pertinent language of the collective bargaining agreement and concluded that "the agreement could be read as entitling [Burke] to reinstate-

[3] References designated by an arabic numeral followed by a small a, as p. 1a, are to the opinion of the court below in the proceedings to enjoin arbitration which is printed as an appendix to this brief.

ment". (451 F.2d at p. 21, p. 5a, *infra*). In support of this conclusion the court relied upon the fact that the collective bargaining agreement set forth the conditions under which employees lose seniority rights, but that promotion to a supervisory position is not among the listed bases for losing seniority (451 F.2d at p. 20, p. 3a, *infra*). The court stated (451 F.2d at p. 20, p. 3a, *infra*):

> "In particular, the notion that seniority is inextricably intertwined with the right to reinstatement provides, in our view, a basis for an interpretation favorable to Burke of the word 'employee' in the coverage clause. The argument would be that under the agreement supervisors retain seniority accrued before their promotions and that, therefore, they remain employees for the purpose of exercising seniority rights and their right of reinstatement, like that of other employees, is determined solely by their seniority."

The court noted that the collective bargaining agreement showed that the parties contemplated that demoted supervisors would return to the unit because in the maintenance of membership clause, there was an express provision requiring union membership of "former supervisory personnel who have been demoted by the Company into the bargaining unit" (451 F.2d, at p. 21, pp. 4a-5a, *infra*).

In addition, the court of appeals relied upon the express provision that an employee promoted out of the bargaining unit to be the seventh foreman retains his seniority rights accrued while working in the unit and upon demotion will "revert to his previous status" (451 F.2d at p. 21, pp. 3a, 4a-5a, *infra*), as showing that the parties did not regard supervisory status as inconsistent

with retention of employee rights under the collective bargaining agreement.[4]

After analyzing the contract language which even to a nonexpert afforded basis for sustaining the grievance, the court of appeals pointed to two lines of decisions involving labor management expertise which similarly would support the construction of the language of the collective bargaining agreement sought by the Union. Decisions of both the National Labor Relations Board that laid-off employees retain seniority rights and of arbitrators that supervisors retain seniority rights were cited. The court stated (451 F.2d at p. 21, p. 4a, *infra*):

> "We note that, under settled law, a laid-off employee is still an employee. Burke is arguably in a status akin to, if somewhat different from, that of a laid-off employee. He is willing to work though not now working and arguably possesses

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[4] The context in which the provision respecting the seventh foreman appears supports the view that the Union and the Company assumed that all foreman promoted from the ranks retained seniority in the bargaining unit while holding a supervisory position. The language appears in Article XXII entitled General Provisions, Paragraph (f), which is a long paragraph placing numerous restrictions on work by supervisors, aimed at preserving work for employees in the bargaining unit. With respect to the ratio of foremen to rank and file employees, the paragraph reads, "As of the date of the signing of this Agreement there are six (6) working foremen. The seventh (7th) may be added provided that the Company promotes from within the ranks of the regular employees, and the number of union and probationary employees total seventy (70) or more. If the total of union and probationary employees is reduced below seventy (70) the seventh (7th) working foreman would revert to his previous status (regarding union seniority to date of his promotion)." This appears at p. 27 of the appendix filed in the court of appeals. The clerk of that court has been requested to certify a copy to this Court.

certain rights which have accrued to him, *qua* employee, under the collective bargaining agreement. This position has been taken in several arbitrators' decisions which, while they deal with different collective bargaining agreements and do not in any event bind us, suggest that the mode of analysis is not inconceivable to those involved in labor-management relations." (footnotes omitted)

The arbitrator's opinion and award

The arbitrator wrote a careful opinion in which he ruled that the grievance was arbitrable both as a Union grievance and as the individual grievance of Burke (pp. A-24, A-25). In so ruling the arbitrator pointed out that an interpretation of the provisions of the collective bargaining agreement for purposes of the issues of arbitrability here invoked necessarily involved the resolution of the issue on the merits. He characterized "the underlying merits of the controversy" as "inextricably interwoven with the question of substantive arbitrability" for a construction "for purposes of the arbitrability issue, that the contract grants Burke seniority rights as of the time he first left the bargaining unit," leads to the result "that upon being separated from his supervisory position, he was to automatically resume his status as an employee of the bargaining unit" (p. A-25).

After a thorough analysis of all the applicable provisions of the collective bargaining agreement (pp. A-15 to A-26, A-28 to A-29) the arbitrator entered an award that (p. A-10):

"On October 30, 1965, when * * * Burke was promoted out of the bargaining unit to the position of foreman he had a vested right to the seniority in the bargaining unit which he had accrued since the date of his hire * * *. Upon the date of the loss

of his foreman's job on September 11, 1970, Burke became entitled to reinstatement in the bargaining unit with such seniority as he had accrued up to the date of his promotion on October 30, 1965.

The setting aside of the award by the district court

The Company refused to comply with the award. In proceedings filed in the United States District Court for the District of Massachusetts by the Union under Section 301 of the Labor Management Relations Act, 29 USC 185, the court set aside the award on the ground that "the Arbitrator exceeded his authority in making the award in that it fails to draw 'its essence from the collective bargaining agreement'. *Steelworkers* v. *Enterprise Corp., supra* at 597. See *Torrington Co.* v. *Metal Products Workers Union Local 1645,* 362 F.2d 677 (2d Cir. 1966); *Magnavox Co. of Tennessee* v. *International U. of E., R. & M. W.,* 410 F.2d 388 (6th Cir. 1969)," (p. A-8).

The decision below by the court of appeals

On appeal by the Union to the United States Court of Appeals for the First Circuit, the court reversed the district court in a per curiam opinion which directed enforcement of the arbitrator's award and an award to the Union of the attorneys fees it incurred in the district court proceedings to enforce the award (pp. A-1 to A-2). With respect to the merits, the court of appeals stated (pp. A-1 to A-2):

> "In *Peerless Pressed Metal Corp.* v. *IUE,* 1 Cir., 1971, 451 F.2d 19, we must necessarily have ruled, by requiring arbitration of the issue between the parties, that a decision in favor of the union would not violate the collective bargaining contract on its face. The district court's refusal to enforce the award in its favor, from which refusal the union now appeals, was based on a con-

> trary view of the proper construction of the contract. In light of *Peerless,* this was no longer a permissible conclusion. The only question before the district court was whether the arbitrator's choice was, by reason of some circumstance outside the contract itself, 'so palpably faulty that no judge, or group of judges, could ever conceivably have made such a ruling.' *Safeway Stores* v. *Bakery Workers Local 111,* 5 Cir., 1968, 390 F.2d 79, 82. The arbitrator's careful decision could not be so viewed."

The award to the Union of its attorney's fees was based on the court's finding that the "intransigence" of the Company "in resisting enforcement of the arbitration award, made after" the opinion of the court of appeals on the arbitrability issue, justified requiring the Company to pay the attorney's fees incurred by the Union, but only in the district court proceedings for enforcement (p. A-2). The court did not award the Union attorney's fees resulting from the appeal to the court of appeals because in the court's view such an award would not be fair in view of the success of the Company in the district court.

REASONS FOR DENYING THE WRIT

1. This case does not afford an opportunity to this Court to resolve the appropriate standard of review of arbitration awards.

If the difficulties as portrayed by the petition (pp. 6-11) which some courts seem to be having in applying the standard for review of arbitration awards enunciated by this Court in the *Steelworkers'* "trilogy",[5] require guidance from this Court, the

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[5] *Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564 (1960); *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *Steelworkers* v. *Wheel & Car Corp.*, 363 U.S. 593 (1960).

instant case does not afford an appropriate vehicle. This case presents the unique situation that the issue of arbitrability was governed by the same construction of the same contract language as the issue of the merits of the grievance. The court of appeals in determining arbitrability ruled that the provisions of the agreement permit the "possible" inference that a supervisor retains seniority gained in the unit and reverts to that seniority on loss of his supervisory status (451 F.2d 21, pp. 4a, 5a, *infra*). The court of appeals in its first opinion held this possible construction was applicable both to decision of the grievon the merits and to the decision of arbitrability (451 F.2d at 20-21, p. 5a, *infra*).

The arbitrator explained in his opinion that the resolution of this seniority issue caused the inextricable intermingling of the issue of arbitrability and the issue of the merits (p. A-25). And in enforcing the award the court of appeals held that its ruling in its first opinion that such a construction of the contract would not violate the collective bargaining agreement, meant that the Company could not, in a second suit, attack the arbitration award solely on the ground that the contract was not susceptible of this construction (pp. A-1 to A-2).

There is nothing in the opinion of the court below which either expressly or by implication suggests that a holding that a grievance is arbitrable operates to narrow in any respect the issues open to any party in proceedings to review the award, except only an issue which was necessarily decided in the determination of arbitrability. The court of appeals thereby applied traditional principles of *res judicata*.

Nowhere in the petition is there any contention that the Company raised any issue as to the validity of the award which had not been decided by the court of appeals in ruling that the grievance was arbitrable. Hence the Company's attack on the judgment below is necessarily an attack on established principles of *res judicata*. We cannot believe this Court is interested in reviewing this issue.

2. The decision below presents no conflict with any decision of this Court or with any of the courts of appeals.

The petition has failed to point to any decision of this Court or any court of appeals where this Court or the court of appeals has refused to apply the *res judicata* principle in reviewing an arbitration award attacked solely on grounds previously decided in prior litigation between the same parties involving issues of arbitrability.

3. The arbitrator's award was so clearly correct that its enforcement presents no issue deserving review.

If we are wrong in our contention that the decision below was governed by principles of *res judicata* rather than principles of standards for enforcement of arbitration awards, we suggest that the arbitration award was so clearly correct as to make it unlikely that this Court would choose this case for the purpose of clarifying standards for enforcement of arbitration awards.

The arbitration award applies the same principles governing seniority rights of employees who seek to move back and forth between nonsupervisory and supervisory positions as the majority of arbitrators dealing with similar contractual language. The arbitrator here explained in his opinion how Burke's right to reinstatement was spelled out of the various pro-

visions of the collective bargaining agreement, including the language providing seniority rights for employees, accompanied by a careful listing of the ways seniority rights may be lost, which did not include any provision that promotion to supervisor was a way of losing seniority (pp. A-25 to A-29). The court below in its opinion enforcing arbitration had held the contract language could be so construed and cited arbitration awards reaching the same result (451 F.2d at 21, fn. 3, p. 4a, *infra*). In addition to the arbitration awards cited by the court below see *Rodman Industries, Inc.*, 59 LA 101 (George R. Fleischil, arbitrator 1972); *Hawaiian Telephone Co. and IBEW*, 59 LA 366 (Joel Seidman, arbitrator 1972); *Gartland-Haswell Foundry Co.*, 60 LA 1061 (David L. Kabaker, arbitrator 1973); *Fruehauf Corp.*, 54 LA 1093 (Alpheus R. Marshall, arbitrator 1970); *Cedar Rapids Engineering Co.*, 58 LA 374 (Albert Epstein, arbitrator 1972); *Fred Rueping Leather Co.*, 57 LA 58 (Gerald G. Somers, arbitrator 1971); *Gould Inc. (Engine Parts Division)* 56 LA 712 (Marvin L. Schurke, arbitrator 1971); *Chromalloy American Corp. & IUE*, 54 LA 965 (Edwin A. Elliot, arbitrator 1970); *Gibson Refrigerator*, 50 LA 1052 (M. David Keefe, arbitrator 1968). For a discussion of the issue from a personnel relations point of view, see Philip Harris, *Arbitrators and the Seniority Rights of Foreman*, Management of Personnel Quarterly, Fall 1966, p. 36.

The proper scope of review of arbitration awards was established in *Steelworkers* v. *Enterprise Corp.*, 363 U.S. 593, 596 (1960) wherein this Court stated:

> "The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements."

The district court, although paying lip service to the *Steelworkers* trilogy (p. A-5) departed from this standard and in effect reviewed the merits of the arbitrator's award (pp. A-6 to A-8). The district court deemed the arbitrator's decision erroneous and by legerdemain transformed the alleged arbitral error into an arbitral excess of authority. This is an indefensible inroad on contractual finality. For a scholarly analysis of the difference between arbitral error and arbitral authority see Bernard Dunau, *Scope of Judicial Review of Labor Arbitration Awards,* N.Y.U. Conf. Lab. 24:175, 210-215 (1971). The judgment of the court reversing the district court was correct, judged by either the standards of *res judicata* or by the standards of review of arbitration awards adopted by this Court in the *Steelworkers* trilogy.

4. The decision below awarding limited attorney's fees is correct and presents no issue requiring review by this Court.

In view of the Court's ruling last term in *Hall* v. *Cole,* 93 S.Ct. 1943 (May 21, 1973) no important issue of law is raised by the petitioner's challenge to the court of appeals' limited award of attorney's fees because of the Company's intransigence in refusing to obey the arbitration award for the same reason as had already been rejected by the courts in enforcing arbitration (p. A-2).

In *Hall* this Court reiterated the principle that "federal courts in the exercise of their equitable powers may award attorney's fees when the interests of justice so require." This Court noted that (93 S.Ct., at p. 1946):

> "Indeed, the power to award such fees 'is part of the original authority of the chancellor to do equity in a particular situation,' *Sprague* v.

> *Ticonic National Bank,* 307 U.S. 161, 166 (1939), and federal courts do not hesitate to exercise this inherent equitable power whenever 'overriding considerations indicate the need for such a recovery.' *Mills* v. *Electric Auto-Lite Co.,* 396 U.S. 375, 391-392 (1970); see *Fleischmann Distilling Corp.* v. *Maier Brewing Co.,* 386 U.S. 714, 718 (1967)."

In awarding attorney's fees in *Hall,* this Court reviewed the established exceptions to the American rule that disfavors the allowance of attorney's fees and categorized the situations where federal courts have properly awarded such fees.

The category applicable here is described by this Court as composed of the litigant who has acted "in bad faith, vexatiously, wantonly, or for oppressive reasons" (93 S.Ct., at 1946). The court below having written an elaborate opinion in enforcing arbitration, detailing the various provisions in the collective bargaining agreement which could properly be construed to sustain Burke's right to reinstatement, found it unreasonable for the Company to require the Union to resort to court to enforce the award when the Company had no defense except the same arguments about contract language which the court had already rejected. The court deemed it only fair that the Company should pay the legal fees which resulted from the Company's completely unreasonable refusal to accept the first opinion of the court of appeals as settling that the language of the agreement could properly be read as authorizing the reinstatement of Burke.

This decision is in accord with recent decisions of other courts of appeals that employers who unreasonably force a union to resort to litigation under Section 301 of the Labor Management Relations Act to enforce

an arbitration award should properly be required to pay the union's attorneys fees. *Local No. 149, I.U.A.* v. *American Brake Shoe Co.*, 298 F.2d 212 (4th Cir. 1962); *Int'l Union District 50* v. *Bowman Transportation Inc.*, 421 F.2d 934, 935 (5th Cir. 1970); *Steelworkers* v. *Butler Mfg. Co.*, 439 F.2d 1110, 1112 (8th Cir. 1971).

CONCLUSION

For the foregoing reasons it is urged that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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